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Nos. 83-1798 and 83-2064

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

SECRETARY OF EDUCATION,
UNITED STATES DEPARTMENT OF EDUCATION,
Petitioner,

v.

COMMONWEALTH OF KENTUCKY
DEPARTMENT OF EDUCATION

T.H. BELL, SECRETARY OF EDUCATION,
Petitioner,

v.

STATE OF NEW JERSEY

On Certiorari to the United States Courts of Appeals for the Third Circuit and for the Sixth Circuit

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BRIEF FOR THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW AS *AMICUS CURIAE* IN SUPPORT OF REVERSAL

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BRIEF FOR THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW AS *AMICUS CURIAE*

INTEREST OF *AMICUS CURIAE*[1]

The Lawyers' Committee for Civil Rights Under Law was organized in 1963 at the request of the President of the United States to involve private attorneys in the national effort to assure civil rights for all Americans. The Committee has, over the past 21 years, enlisted the

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[1] Letters from counsel for the parties consenting to the filing of this brief have been submitted to the Clerk.

services of over a thousand members of the private bar in addressing the legal problems of minorities and the poor.

The Lawyers' Committee has had a long-standing interest in Title I of the Elementary and Secondary Education Act of 1965[2] because of the statutory emphasis upon meeting the needs of poor and disadvantaged children. The Committee has sought to promote vigorous enforcement of the programmatic and fiscal restrictions in the statute and implementing regulations.[3]

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[2] In 1981 the Title I program was replaced by "Chapter 1" of the Education Consolidation and Improvement Act of 1981, Pub. L. No. 97-35, §§ 552 *et seq.*, 95 Stat. 464-69 (codified at 20 U.S.C. §§ 3801 *et seq.* (1982)). Chapter 1 retains the Title I focus upon assisting educationally disadvantaged children residing in high poverty areas, *see* Pub. L. No. 97-35, § 552, 95 Stat. 464 (codified at 20 U.S.C. § 3801 (1982)), as well as the specific targeting and non-supplanting provisions of the Title I law, *see id.*, §§ 556(b)(1), 558(b), 95 Stat. 466, 468 (codified at 20 U.S.C. § 3805(b)(1), 3807(b) (1982)). Hence, the rulings below have continuing importance for the major federal program of aid to elementary and secondary schools.

[3] In the early 1970's the Committee began to monitor the administration of the Title I program, in order to determine whether states and local school districts were using their grants to operate projects which carried out its basic purpose. These activities greatly intensified in 1975 with the establishment of the Committee's Federal Education Project. One of the Project's major goals was to stimulate adherence to the categorical restrictions of the Title I statute and regulations in order to increase the effectiveness of local compensatory programs. The Project served as an informational resource for parents of Title I participants and Title I staff in local school districts, and it provided legal representation to parents of Title I students in litigation and administrative complaint proceedings, including an important supplanting case, *Alexander v. Califano*, 432 F. Supp. 1182 (N.D. Cal. 1977).

In 1976, pursuant to a contract with the National Institute of Education, the Lawyers' Committee established a separately staffed unit, the Legal Standards Project, to investigate and analyze the legal framework of Title I. At the request of members of the Congressional authorizing committees, this project subsequently made extensive recommendations for legislative changes and prepared a draft bill. Many of its suggestions were incorporated in the Education Amendments of 1978, Pub. L. No. 95-561, 92 Stat. 2143, *reprinted in* 1978 U.S. Code Cong. & Ad. News 2143 *et seq.*, and the Congress' reliance upon the work of the Legal Standards Project is acknowledged in the legislative history of the 1978 amendments.

Appropriations for Title I and Chapter 1 were not and are not unlimited. For this reason, each year thousands of educationally deprived students cannot receive compensatory services. Congress was conscious of this fiscal reality and wrote into law a set of requirements that are central to the functioning of an effective program, including (1) accurate targeting of compensatory projects to serve only eligible schools and attendance areas, and (2) continuation of state and local expenditures for basic education programs for participating children so that federally funded projects provide *extra* services to needy students.

Compliance with these requirements is essential, in our judgment, to the educational effectiveness of compensatory instruction projects funded by the federal government. Our experience indicates that meaningful compliance depends, in significant part, upon the expectation that audit and recoupment of misspent funds will follow any failure to adhere to the terms and conditions of the program. Thus, the Committee is concerned that the holdings below, anouncing rules of construction which defeat recovery of funds not expended in accordance with grant-in-aid agreements accepted by Kentucky and New Jersey, will have a detrimental impact upon educational opportunities for poor children by weakening the incentive for adherence to statutory and regulatory requirements.

Rather than crediting ingenious arguments that evade the Congressional intention expressed in these statutory restrictions, as the courts below did, state and local education officials should be held to adhere to the fiscal and program limitations of federal law, as interpreted by the Department of Education, when audit proceedings are subjected to judicial review.

STATEMENT

In 1965, Congress enacted Title I of the Elementary and Secondary Education Act,[4] which provided federal grants to states and local school districts for programs designed to assist educationally deprived children in areas with high concentrations of low-income families. In order to ensure that Title I grants benefited these children, the statute included specific conditions with which state education agencies (SEAs) and local education agencies (LEAs) were required to comply.[5] Two conditions are particularly relevant to these cases: *first*, Title I funds could be expended only for projects serving eligible attendance areas and schools; *second*, students participating in Title I projects had to receive their "fair share" of state and local expenditures so that federal funds provided truly supplemental services.[6] State and federal audits were authorized to assess local compliance with statutory criteria.

New Jersey and Kentucky participated in the Title I program each year following its enactment and were aware of the various statutory and regulatory requirements for participation. However, audits conducted by the United States Department of Health, Education and Welfare[7] resulted in determinations that both States had misapplied substantial amounts of federal Title I funds.

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[4] Pub. L. No. 89-10, 79 Stat. 27, *reprinted in* 1965 U.S. Code Cong. & Ad. News 29, as renumbered by Pub. L. No. 89-750, § 116, 80 Stat. 1191, 1198, *reprinted in* 1966 U.S. Code Cong. & Ad. News 1392, 1400.

[5] These conditions were repeated and amplified in the administrative regulations and further clarified in numerous Title I Program Guides sent to all of the states as early as 1968. *See infra* notes 48-51 & accompanying text, 55-57 & accompanying text.

[6] The same sorts of restrictions apply to the grant-in-aid program which replaced Title I. *See supra* note 2.

[7] The Title I program was administered by the Department of Health, Education and Welfare prior to the creation of the Department of Education by Pub. L. No. 96-88, 93 Stat. 668, *reprinted in* 1979 U.S. Code Cong. & Ad. News 668 (codified at 20 U.S.C. §§ 3401 *et seq.* (1982)).

New Jersey. Federal auditors found that the SEA incorrectly approved Title I grant applications for the 1970-71 and 1971-72 school years from the Newark LEA, which then used the grant funds in school attendance areas that were not eligible to participate in the Title I program.[8] New Jersey disputed these findings,[9] but except for reductions required by a "statute of limitations"[10] the Education Appeal Board sustained the auditors' claims and the Secretary of Education declined

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[8] *See* Joint Appendix at 11-34, *Bell v. New Jersey*, —— U.S. ——, 76 L. Ed. 2d 312 (1983) (Final Audit Report) [hereinafter cited as N.J.J.A.]. The federal statute required that projects be located to serve "school attendance areas having high concentrations of children from low-income families," 20 U.S.C. § 241e(a)(1)(A) (1970). Regulations and Title I Program Guides issued between 1965 and 1970 by the Department of Health, Education and Welfare, *see Wheeler v. Barrera*, 417 U.S. 402, 407, 420 n.14 (1974), defined this term to mean attendance areas having higher-than-average numbers or percentages of children from poor families than the school district as a whole. *See generally* N.J.J.A. at 14-16; *infra* pp. 23-27.

[9] The dispute as to the 1970-71 school year is whether the Newark LEA qualified for an exception to the usual eligibility requirement, *see supra* note 8, because there was "no wide variance," within the meaning of the regulations and Program Guides, in the level of poverty among the district's school attendance areas. The dispute as to the 1971-72 school year concerns the correct manner of documenting and comparing levels of poverty among attendance areas in determining eligibility.

[10] 20 U.S.C. § 884 (Supp. IV 1974), as added by Pub. L. No. 93-380, § 106, 88 Stat. 484, 512, *reprinted in* 1974 U.S. Code Cong. & Ad. News 541, 576, provided that:

> No state or local educational agency shall be liable to refund any payment made to such agency under this Act (including Title I of this Act) which was subsequently determined to be unauthorized by law, if such payment was made more than five years before such agency received final written notice that such payment was unauthorized.

See also H.R. Rep. No. 805, 93rd Cong., 2d Sess. 78-79, *reprinted in* 1974 U.S. Code Cong. & Ad. News 4093, 4160. The currently applicable version of this provision is codified at 20 U.S.C. § 1234a(g) (1982).

to disturb its decision.[11] On review of the Department's action in the Court of Appeals,[12] a panel held that 1978 amendments to Title I which eased the eligibility requirements for school attendance areas [13] should be given retrospective effect so as to validate the earlier expenditures to the extent that they would have been proper under the new eligibility criteria.[14] The panel remanded to the Secretary of Education to determine precisely which of the challenged expenditures would have been permissible under the 1978 statutory amendments.[15]

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[11] *See* N.J. Pet. at 13a-15a.

[12] *See id.* at 15a n.12.

[13] Pub. L. No. 95-561, § 101(a), 92 Stat. 2143, 2161-62 (codified at 20 U.S.C. § 2732(a)(1) (1982)).

[14] N.J. Pet. at 4a-5a.

[15] There are two reasons why the expenditures in question might not have been lawful even had they been made after 1978. *First*, as the court below recognized, use of the provision added in 1978 was conditioned upon a special "maintenance of effort" requirement for compensatory programs; since New Jersey had not sought to rely upon the 1978 law prior to review in the Court of Appeals, the record previously made in the administrative proceedings is not adequate to determine whether this condition has been met (*see* N.J. Pet. at 5a). *Second*, the Title I law and regulations always required that projects be of "sufficient size, scope and quality" to offer hope of significant achievement gains for participants. *See* Pub. L. No. 89-10, § 2, 79 Stat. 27, 30, *reprinted in* 1965 U.S. Code Cong. & Ad. News 29, 33 (current version at 20 U.S.C. § 2734(d) (1982)). This requirement usually resulted in a school district's establishing Title I projects at fewer than all eligible schools, in light of limited Congressional appropriations—which never reached the authorization level contained in the statute. *See infra* note 51. Because, in this case, the federal auditors determined that the number of eligible schools was itself improperly inflated, they had no occasion to consider whether Newark's Title I program during the years in question otherwise met the "size, scope and quality" requirement. Thus, even if the 1978 amendments' 25%-eligibility provision could be used in Newark, questions about the program's conformity with other statutory and regulatory requirements would remain. Nevertheless, this matter is ripe for review since the decision below finally—and erroneously—determines the issue of retroactivity and will bind the Department of Education in Title I audit cases which are now pending and which may in the future arise from the States within the Third Circuit. *Cf.* N.J. Pet. at 16 ($68 million in Title I audit claims pending).

Kentucky. In Fiscal Year 1974, with SEA approval, some 50 LEAs throughout the state placed first- and second-grade Title I participants in separate classrooms with Title I teachers. Except for a few "enrichment classes," these students received their entire academic instruction, including the basic state-mandated curriculum, through the federally funded Title I program.[16] Although gross state and local expenditures at Title I schools were not reduced, again with the exception of the enrichment classes the students participating in Title I did not receive the benefit of any of these expenditures.

Federal auditors concluded that these practices constituted "supplanting" in violation of the statutory requirement that Title I funds

> be [so] used (i) as to supplement . . . the level of funds that would, in the absence of such Federal funds, be made available from non-Federal sources *for the education of pupils participating in programs and projects assisted under this subchapter*, and (ii) in no case, as to supplant such funds from non-Federal sources.[17]

With certain modifications not relevant to the issues before this Court, the Education Appeal Board and the Secretary of Education upheld the auditors' supplanting findings.[18] A panel of the Court of Appeals, however,

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[16] Ky. Pet. at 22a (findings of Education Appeal Board).

[17] 20 U.S.C. § 241e(a)(3)(B) (1970) (emphasis added).

[18] The Audit Report sought repayment only of those Title I funds expended on readiness classes for students who were promoted to the next grade level at the end of the school year—apparently to avoid any question whether students retained at the same grade level would ultimately receive their "fair share" of state and local

refused to sustain the repayment demand. While the Department's interpretation of the statutory anti-supplanting language and implementing regulations was "reasonable" and would be controlling in future cases, the Court of Appeals said:

> [T]he statutory and regulatory provisions at issue were [not] sufficiently clear to apprise the Commonwealth of its responsibilities. . . .
>
> . . . .
>
> [I]t is unfair for the Secretary to assess a penalty against the Commonwealth for its purported failure to comply substantially with the requirements of law, where there is no evidence of bad faith and the Commonwealth's program complies with a reasonable interpretation of the law.[19]

SUMMARY OF ARGUMENT

I

Because the 1978 amendments to Title I explicitly were not made effective prior to October 1, 1978; because the statutory change upon which New Jersey seeks to rely is a substantive, rather than procedural or remedial one; because this matter arises from the state's voluntary acceptance of pre-1978 statutory terms and conditions under a federal grant program; and because the rule of retroactivity adopted by the Third Circuit is unworkable in

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resources when they repeated the same curriculum. *See* Joint Appendix in No. 83-1798, at 17 (Final Audit Report). The Department of Education adopted this position, despite the misgivings of the Education Appeal Board (*see* Ky. Pet. at 30a), and the case does not now turn upon the propriety of this approach. *See* Ky. Pet. at 16a. Additionally, the Secretary reduced the demand for repayment in light of the fact that the "readiness" classes were smaller than most regular classes in the state (*see* Ky. Pet. at 38a-42a). The correctness of this adjustment is also irrelevant at this time: the Sixth Circuit's ruling eliminates *any* repayment of *any* funds on account of *any* supplanting.

[19] Ky. Pet. at 9a-10a, 12a.

both the legislative and administrative process, its judgment should be reversed.

II

Because the case before the Sixth Circuit originated in Kentucky's petition for judicial review of agency action, once the Court of Appeals concluded that the Education Department's interpretation of the Title I statute and regulations was a "reasonable" one, it should have deferred to the agency. In addition, the view of the panel below that the statute and regulations were ambiguous is unsupportable.

III

Contrary to the arguments of New Jersey and Kentucky and the intimations of the courts below, the grant conditions which the auditors found those states to have violated were adopted early in the history of the Title I program, were repeatedly communicated to the states, and were critical to the effectiveness of the compensatory projects funded by the federal government.

ARGUMENT

Introduction

In *Bell v. New Jersey*, —— U.S. ——, ——, 76 L. Ed. 2d 312, 326 (1983), this Court ruled "that the pre-1978 version of [Title I] requires that recipients be held liable for funds that they misuse"[20] by making repay-

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[20] *See also id.*, 76 L. Ed. 2d at 322, quoting S. Rep. No. 634, 91st Cong., 2d Sess. 84, *reprinted in* 1970 U.S. Code Cong. & Ad. News 2768, 2827 ("Even though there may be difficulties arising from recovery of improperly used funds, those exceptions must be enforced if the Congress is to carry out its responsibility to the taxpayer"). The states are, of course, accorded substantial opportunities to demonstrate the propriety of challenged expenditures and have a right to judicial review prior to making any repayment. *See id.*, 76 L. Ed. 2d at 327-28.

ment to the United States.[21] The decisions below will substantially frustrate the ability of the federal government to obtain such repayments. Without any basis in the statutory language or legislative history, and contrary to longstanding administrative interpretations of the law, the courts below extinguished the obligations of Kentucky and New Jersey to repay Title I funds expended in contravention of statutory and regulatory provisions[22] in force at the time the states accepted Title I

[21] Up to 75% of the amount recovered may be returned to the state to be used, "to the extent possible, for the benefit of the population that was affected by the failure to comply or by the misexpenditures which resulted in the audit exception," 20 U.S.C. § 1234e(a)(2) (1982). *See* Ky. Pet. at 15 n.13.

[22] For purposes of resolving the legal issues presented to this Court, it must be assumed that the states and their constituent LEAs failed to comply with relevant federal program requirements. *See Bell v. New Jersey*, 76 L. Ed. 2d at 327.

In the *Kentucky* case, the Sixth Circuit panel declined to enforce the Secretary's demand for repayment because of its view that the Title I regulations were "ambiguous," the misexpenditures identified by the auditors therefore did not constitute "substantial noncompliance," and for this reason repayment of the misspent funds was an "unfair . . . penalty" (*id.* at 12a). But the Court of Appeals agreed that the expenditures for "readiness" classes were inconsistent with the Department of Education's "reasonable" interpretation of the Title I statute and regulations (Ky. Pet. 8a-9a) and the Commonwealth has not challenged that determination.

In the *New Jersey* case, the state has acknowledged that " 'there were irregularities in the original grant approval process' " (N.J. Pet. 46a) resulting from the presence of a "flaw in the initial formula" used to determine eligible school attendance areas in the Newark district (*id.* at 45a). *See id.* at 40a (Decision of Education Appeal Board) ("the New Jersey SEA admits it did not meet the Title I requirements for determining the eligibility of school attendance areas for Title I funding when it approved Newark's 1971-72 project application with respect to 13 Newark schools"). Although New Jersey argued that at least some of these schools would have been eligible under a proper formula (*see id.* at 8a), the Third Circuit never decided this question. In 1981 that court held that the Secretary of Education had no authority to order repayment of misexpended funds, *New Jersey v. Hufstedler*, 662

grants.[23]

We agree fully with the United States that the rulings below are doctrinally unsound, for the reasons outlined in the first two arguments below. In addition, we submit that these rulings may ultimately be traced to the lower courts' erroneous perception that states and local school districts were burdened by unfair or unclear programmatic and fiscal restrictions which interfered with the educational efficacy of Title I projects. However, as we show in the third argument, the conditions which New Jersey and Kentucky violated were very deliberately inserted into the statutory scheme by Congress; they are central to the success of the compensatory education effort; they are comprehensible and capable of straightforward application; and they were promulgated and clearly explained to state officials by the federal government prior to the misexpenditures which are the subject of these suits.

I

The Third Circuit's Retroactivity Holding Is Contrary to Established Legal Principles And Is Unworkable

In the *New Jersey* case, the Third Circuit erroneously applied well-settled rules of statutory construction when it held that eligibility criteria enacted in 1978 could be

F.2d 208, *rev'd sub nom. Bell v. New Jersey*, —— U.S. ——, 76 L. Ed. 2d 312 (1983). On remand, the Third Circuit applied 1978 statutory amendments retroactively to validate Newark's eligibility determinations which, it said, "arguably overstated the relative size of the class of students from low-income families" (N.J. Pet. at 3a). The only question now before this Court, therefore, is whether the 1978 amendments should have been applied in this retrospective manner to excuse New Jersey from the obligation it would otherwise have to repay funds to the Department of Education.

[23] *See* 76 L. Ed. 2d at 326 ("The State chose to participate in the Title I program and, as a condition of receiving the grant, freely gave its assurances that it would abide by the conditions of Title I").

applied retrospectively, so as to excuse a Title I grant recipient's noncompliance with different criteria that were contained in federal law when the disputed expenditures were made (in 1970-71 and 1971-72). The 1978 amendments to Title I specifically provided that "the provisions of this Act and the amendments and repeals made by this Act [34] shall take effect October 1, 1978.[25] Thus, the panel below erred in concluding that "[t]here is . . . nothing in the 1978 amendments or the legislative history [which] indicates that the amendments were not intended to be applied retroactively" (N.J. Pet. 4a). And, that being the case, the predicate for application of the *Bradley* [26] principle evaporates.

Moreover, *Bradley* involved remedial, not substantive, changes in the law;[27] thus, even in the absence of the legislative directive for prospective application contained in the 1978 amendments,[28] *Bradley* would be inapplicable. Where new legislation alters a substantive provision of

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[24] New Jersey does not contend, and the Third Circuit did not hold, that the 1978 amendments explicitly repealed or explicitly amended, retrospectively, the previous eligibility standards which the auditors found to have been violated. Repeals by implication of course are not favored. *E.g., Kremer v. Chemical Construction Company*, 456 U.S. 461, 468-78 (1982).

[25] Pub. L. No. 95-561, § 1530, 92 Stat. 2143, 2380, *reprinted in* 1978 U.S. Code Cong. & Ad. News 2143, 2380.

[26] *Bradley v. School Board of Richmond*, 416 U.S. 696 (1974). *See* N.J. Pet. 4a.

[27] In *Bradley*, this Court noted that upon enactment of § 718 of the Education Amendments of 1972, authorizing the award of attorneys' fees to prevailing plaintiffs in school desegregation cases, "there was no change in the substantive obligation of the parties." 416 U.S. at 721. Here there is no question about the substantive impact of the 1978 amendments in altering school attendance area eligibility criteria. *See also Bell v. New Jersey*, 76 L. Ed. 2d at 318 n.3.

[28] *See supra* note 25 and accompanying text.

a statutory scheme, the general rule is that it is to be given prospective effect only.[29]

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[29] *E.g., United States v. Security Industrial Bank*, 459 U.S. 70, 79 (1982). *Compare* N.J. Pet. at 17a-18a (summarizing New Jersey's earlier arguments against retroactive application of 1978 amendment to Title I delineating audit repayment obligation).

Congress uses explicit language when it wishes a substantive statutory amendment to have retrospective effect. For example, in 1984 the House of Representatives adopted amendments to the Gneral Education Provisions Act designed to alter the auditing and repayment process. *See* 129 Cong. Rec. H7891 (introduction of final version), H7902-03 (§ 808), H7904 (passage) (daily ed., July 26, 1984). These amendments deliberately avoided the use of language which would have given them retrospective application in pending audit proceedings. As their primary floor sponsor recognized, retroactivity

> would violate the basic principle that grantees should be held accountable for the expenditures of funds under the law as it was when they received the funds. A current law standard would treat differently grantees who received funds at the same time. Depending on when they were audited, grantees would be held to different program requirements based upon the state of the law when they were audited. A grant might be made on the basis of one set of standards, an audit conducted on a second, an administrative appeal heard on a third, and judicial review sought on a fourth.

Id. at H7814 (Rep. Ford) (daily ed., July 25, 1984).

However, the measure adopted by the House would have made certain provisions of the *1978 Title I amendments* retrospective. Section 808(a)(4) of Rep. Ford's floor amendment, *id.* at H7903 (daily ed., July 26, 1984), provided:

> In any final audit determination pending before the Secretary of Education or the Education Appeals Board on or made after the date of enactment of this Act pursuant to section 452 of the General Education Provisions Act (20 U.S.C. 1234b), the provisions of sections 122(a)(1) and 132 of the Elementary and Secondary Education Act of 1965 (20 U.S.C. 2732(a)(1), 2752) shall be considered to apply with respect to expenditures made before October 1, 1978, in the same manner that such provisions apply to expenditures made on or after that date, without regard to the provisions of subsections (b)(2),

There is a further reason why the *Bradley* principle is inapplicable to the dispute between New Jersey and the United States. Because it arises out of the state's voluntary acceptance of federal funds in exchange for "its assurance that it would abide by the conditions [contained in the statute and regulations]," [30] the case is governed by principles of contract law. Post-grant legislation is relevant only insofar as it unambiguously represents a waiver of the contractual conditions.[31] Absent such a waiver, there is no basis for modifying the con-

(e), and (f) of section 131 of such Act (20 U.S.C. 2751) requiring that certain determinations be made in advance.

This portion of the bill would have mooted the *New Jersey* case by authorizing retrospective use of the "25% rule." It was, however, dropped from the legislation prior to its final passage. *See* 129 Cong. Rec. S12906 (Sen. Hatch), S12908 (Sen. Kennedy) ("One issue that was included in the House legislation but dropped in conference was the audit reform provisions"), S12909 (passage of conference report) (daily ed., October 3, 1984); *id.* at H11425 (Rep. Hawkins), *id.* (Rep. Jeffords), H11426 (Rep. Ford), H11429 (Rep. Goodling), H11430 (acceptance of conference report) (daily ed., October 4, 1984).

This history indicates that the Congress can and does employ explicit retroactivity language when it desires to create an exception to the general rule that substantive amendments apply only prospectively, especially in grant programs.

[30] *Bell v. New Jersey*, 76 L. Ed. 2d at 326-27; *see also, id.* at 329 (White, J., concurring).

[31] Enactment of a bill directing the Secretary of Education not to seek to recover misexpenditures identified in audits completed prior to a specified date would constitute a waiver. (Such measures were considered by the Congress in 1980 and 1981 but never enacted. *See Dismissing Certain Cases Pending Before the Education Appeal Board: Hearings on H.R. 8145 Before the Subcommittee on Elementary, Secondary and Vocational Education of the House Comm. on Educ. & Labor*, 96th Cong.. 2d Sess. (1980) (bill never reported out); 127 Cong. Rec. S5427-30, S5442 (daily ed., May 21, 1981) (floor amendment rejected on point of order).) Similarly, the five-year "statute of limitations" on repayment of misexpenditures of Title I funds, *see supra* note 10, is such a waiver under the circumstances specified in that provision.

tractual understanding between the parties by virtue of a subsequent enactment applying to future grants; this amounts to rewriting the contract to the detriment of the Department of Education, and that of the program's beneficiaries.

Finally, because of its consequences both for the legislative process and for administration of federal assistance programs, the Third Circuit's ruling is unworkable. As this Court is well aware, the statutory framework of federal grant programs rarely remains completely unchanged; rather, successive Congresses often amend and re-amend an enactment in the light of experience and perceptions. Indeed, State and local grantees are among the most fervent supporters of this "fine tuning." [32] For this reason, if the decision below is permitted to stand, federal grantees subject to audit exceptions can be expected to seek repeated statutory changes that would make their past non-compliance with program requirements conform to the law. The incentive to maintain compliance with statutory and regulatory provisions will

[32] *See, e.g., Oversight Hearing on Amendments to Title I of ESEA and GEPA: Hearings Before the Subcommittee on Elementary, Secondary and Vocational Education of the House Comm. on Educ. & Labor*, 96th Cong., 1st Sess. 26-32 (1979) (testimony of New York City Schools Chancellor Macchiarola supporting amendment to drop matching funds requirement for schoolwide projects); *Education Amendments of 1977: Hearings on S. 1753 Before the Subcommittee on Education, Arts and Humanities of the Senate Comm. on Human Resources*, 95th Cong., 1st Sess. 1554-58 (1977) (statement of Akron Superintendent of Schools Conrad Ott, requesting amendment to permit continuing services to students who formerly attended Title I-eligible schools that were closed); *id.* at 1397-99 (statement of Pennsylvania Secretary of Education Caryl M. Kline, proposing modification of supplanting provision); *Elementary and Secondary Education Amendments of 1973: Hearings on H.R. 16, H.R. 69, H.R. 5163, and H.R. 5823 Before the General Subcommittee on Education of the House Comm. on Educ. & Labor*, 93rd Cong., 1st Sess. 419 (1973) (testimony of Chicago Assistant Superintendent James Moffat, seeking elimination of annual school eligibility requirement).

be substantially diminished; federal program beneficiaries—in this case, educationally disadvantaged children who most need assistance—will be the losers.

The Third Circuit's approach imputes to the Congress, each time a grant program statute is amended, an intention to have the new provision apply in all pending administrative or judicial proceedings that relate to prior grants. Adoption of this standard, so different from that which presently prevails,[33] will vastly complicate the legislative process. Deliberations about the public policy benefits of any particular amendment will have to be accompanied by the production and analysis of large quantities of information about the current status of all audit exceptions or claims under the grant program, in order to assess the impact of retrospective application of the amendment in such proceedings. It simply defies experience to expect that the Congress will be able to shoulder these additional burdens and engage in reasoned lawmaking.

Since audit or claim proceedings often take years to resolve, many will be repeatedly affected by statutory changes under the Third Circuit's ruling, largely depriving the administrative enforcement process of the finality which is necessary if grantees are to know what is expected of them. Moreover, while the result is to New Jersey's liking in this instance, there seems to be no compelling reason why statutory changes which tighten, rather than relax, program requirements should not also be given retrospective application according to the rule adopted below. For it is inherently no more unjust to recover grant funds from states which fail to anticipate changes in the law than it is to deprive participants in federally funded grant programs of substantial additional benefits[34] because of such changes.

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[33] *See supra* note 29 and accompanying text.

[34] *See supra* note 21.

It is far more realistic, and sensible, to give substantive statutory changes retroactive effect only when Congress explicitly indicates its intention that this result should obtain.[35] That has long been the preferred approach; because the Third Circuit panel departed from that approach without justification, its judgment cannot stand.

II

The Sixth Circuit Erred by Refusing to Follow the Department of Education's "Reasonable" Interpretation of the Statute and Regulations and by Inventing a Wholly Inappropriate Standard for Repayment of Misspent Grant Monies

The Kentucky case reached the Sixth Circuit as a result of the state's petition for review of final administrative action taken by the Department of Education.[36] Accordingly, the task of the court below was a limited one: to determine "whether the [factual] findings of the Secretary are supported by substantial evidence and reflect application of the proper legal standards. § 455, 20 U.S.C. § 1234d(c); 5 U.S.C. § 706." *Bell v. New Jersey*, 76 L. Ed 2d at 328.

There was no controversy over the facts. The use of substantial amounts of Title I grant funds for "readiness" classes which substituted for participating students' regular, state and locally funded, academic education is admitted. The only matter for determination by the reviewing court was whether the reading of the statutory anti-supplanting language which is embodied in Departmental regulations, Program Guides, and the Secretary's interpretations thereof, was proper. As this Court has often emphasized, in this situation

> the task for the Court of Appeals was not to interpret the statute as it thought best but rather the

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[35] *See supra* note 29.

[36] *See Bell v. New Jersey*, 76 L. Ed. 2d at 318-20 n.3.

> narrower inquiry into whether the [agency's] construction was "sufficiently reasonable" to be accepted by a reviewing court. *Train* v. *Natural Resources Defense Council*, 421 U.S. 60, 75 (1975); *Zenith Radio Corp.* v. *United States*, 437 U.S. 443, 450 (1978). To satisfy this standard it is not necessary for a court to find that the agency's construction was the only reasonable one or even the reading the court would have reached if the question initially had arisen in a judicial proceeding. *Zenith Radio Corp.* v. *United States*, 437 U.S. 443, 450 (1978); *Udall* v. *Tallman*, 380 U.S. 1, 16 (1965); *Unemployment Compensation Commission* v. *Aragon*, 329 U.S. 143, 153 (1946).[37]

The Sixth Circuit panel concluded that the Secretary's interpretation of the supplanting prohibition was "reasonable," Ky. Pet. at 8a & n.6. Indeed, far from finding that interpretation to be contrary to law, the Sixth Circuit agreed that, at least prospectively, it would be controlling. *Id.* at 12a. Pursuant to the precedent cited above, that should have been the end of the matter. Instead, the panel below embarked upon a wholly different inquiry than that directed by this Court:

> Nonetheless, in the instant case we do not feel it is our task on appeal to review the reasonableness of the Secretary's interpretation of Title I section 241 e(a)(3)(B) and regulation section 116.17(h). We are not reviewing with reference to the future effect of the Secretary's interpretation of a statute. Rather, in this appeal we are concerned with the fairness of imposing sanctions upon the Commonwealth of Kentucky for its "failure to substantially

[37] *Federal Election Commission v. Democratic Senatorial Campaign Committee*, 454 U.S. 27, 39 (1981); *accord, e.g., Chevron, U.S.A. v. Natural Resources Defense Council*, 52 U.S.L.W. 4845, 4847 n.11 (U.S. June 25, 1984); *Indiana Department of Public Instruction v. Bell*, 728 F.2d 938, 940 (7th Cir. 1984); *Psychiatric Institute of Washington, D.C. v. Schweiker*, 669 F.2d 812, 813-14 (D.C. Cir. 1981) (*per curiam*); *West Virginia v. Secretary of Edu-*

> comply"[8] with the requirements of section 241e (a)(3)(B) and 45 C.F.R. 116.17(h), as those requirements were ultimately interpreted by the Secretary.

[8] *See* 20 U.S.C. § 1234b(a) and § 1234c(a) (1978) (where the Commissioner is said to act upon the belief that a recipient of funds had "failed to comply substantially" with any requirement of law applicable to such funds).

Id. at 9a (footnote omitted).

There simply is no basis in law for this approach. Nothing in the Title I statute suggests that there should be one standard of deference to the administrative agency's interpretation in a declaratory judgment action looking to the future and another in a judicial review proceeding following an audit and demand for repayment.[38] "[T]he pre-1978 version [of Title I] contemplated that States misusing federal funds would incur a debt to the Federal Government for the amount misused . . . ." *Bell v. New Jersey*, 76 L. Ed 2d at 321. If the law were as stated by the court below, then federal grantees could with impunity ignore the "reasonable" interpretations of statutory and regulatory language by administrative agencies until those interpretations were first confirmed in court. This would largely defeat the purpose of delegating interpretive rulemaking authority to the agencies in the first place. The fact that the Court of Appeals viewed the statute and regulations as ambiguous, *see* Ky. Pet. at 9a-10a, 12a, 15a, does not justify the Sixth Circuit's lack of deference to the agency's reading of the law, for it is Congress' in-

[38] 20 U.S.C. §§ 1234b(a) and 1234c(a), cited in footnote 8 of the Court of Appeals' opinion, are inapposite since they deal only with cease-and-desist orders and withholding proceedings, rather than audits. The difference in standard, which in any event would not lead to a difference of result in the *Kentucky* case, *see infra* pp. 27-29, is a rational one. *See* Ky. Pet. at 11 n.9.

tention that the administrative agency should make the choice among alternative interpretations. *See, e.g., Psychiatric Institute of Washington, D.C. v. Schweiker, supra* note 37.

Even on its own terms, the decision below is not defensible. Although the Sixth Circuit characterized Kentucky's position as a "reasonable" one, it supported this assertion only with very general statements from the legislative history of Title I. *See* Ky. Pet. at 11a-12a. The panel simply slid over the precision of the statutory language requiring that federal funds not supplant "funds that would, in the absence of such Federal funds, be made available from non-Federal sources for the education *of pupils participating in programs* and projects assisted" by Title I, 20 U.S.C. § 241e(a)(3)(B) (1970) (emphasis added). *See* Ky. Pet. at 20a. It also ignored Congress' separate insertion into the Title I law in 1970 of a "comparability" requirement, 20 U.S.C. § 241e(a)(3)(C) (1970), which is addressed specifically to equivalence of school-level expenditures, rather than to participant entitlements.[39]

The Sixth Circuit similarly gave little attention to the Title I supplanting regulation in force at the time of the expenditures in question, which was equally explicit about the need to provide Title I participants with their fair share of state and local expenditures:

> Each application for a grant under Title I of the Act for educationally deprived children residing in a project area should contain an assurance that the use of the grant funds will not result in a decrease in the use for educationally deprived children residing in that project area of State or local funds

[39] *See* S. Rep. No. 634, 91st Cong., 2d Sess. 14-15, *reprinted in* 1970 U.S. Code Cong. & Ad. News 2768, 2781-82; 116 Cong. Rec. 10613 (Rep. Quie) (daily ed., April 17, 1970).

> which, in the absence of funds under Title I of the Act, would be made available for that project area and that *neither the project area nor the educationally deprived children residing therein* [*i.e.*, Title I participants] *will otherwise be penalized in the application of State and local funds because of such a use of funds* under Title I of the Act.

45 C.F.R. § 116.17(h) (1973) (emphasis added). The real problem which the Court of Appeals had with the Kentucky audit exception apparently was not the supposed ambiguity of the statute or regulations, but the panel's lack of sympathy with the policy choice made by Congress:

> Given a fixed number of dollars awarded to the school district, the requirement that average per pupil expenditures be transferred to the Title I classrooms, in proportion to the number of students in attendance there who are expected to advance a grade, cannot help but have an adverse impact on the funds available for the regular classroom when the number of regular classrooms and teachers cannot be reduced.[40]

Ky. Pet. at 15a. As we pointed out at the beginning of this section, however, the task of a Court of Appeals engaged in judicial review of agency action does not extend to rewriting the statute to conform to the court's view of the wisest policy. *Compare Alexander v. Califano*, 432 F. Supp. 1182, 1189, 1190 (N.D. Cal. 1977).[41]

[40] In fact, the Secretary of Education had already taken the concern expressed by the panel into account in reducing the amount of repayment which he requested to reflect the smaller pupil-teacher ratios in Title I classes as compared to regular classes. *See supra* note 18.

[41] "One may well differ, as a matter of educational policy, with the legislative choice to concentrate rather than spread aid among educationally deprived children, but that is not a matter for this Court. . . . That the enforcement of the federal requirement is likely to have an impact on State and local programs and may require changes in State regulations and guidelines is not a ground for

The panel of the Court of Appeals in the *Kentucky* case erred in seeking to do this, and its judgment should be reversed.

III

The Eligibility and Supplanting Restrictions at Issue in These Cases are Directly Related and Critical to the Purposes of the Title I Program—and the States Had Both Ample Notice of their Applicability and Adequate Explanation of their Requirements

Throughout the course of these proceedings, both New Jersey and Kentucky have attempted to convey the impression that the eligibility and supplanting restrictions involved in these audits interfered with the realization of the goals of the Title I program in their states' school districts, and also that the Department of Education's interpretations of the statutory and regulatory language were never clearly articulated and explained until the audits had taken place. These arguments are, to some extent, echoed in the opinions of the courts below [42] and they may have contributed to the legal errors made by the Third and Sixth Circuits. In fact, the substantive requirements at issue in these cases—the determination of school and attendance area eligibility, and the prohibition against supplanting state and local resources—are of central importance to the integrity and effectiveness of federal compensatory education programs, which constitute the largest part of federal aid to elementary and secondary education. These requirements have been a

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disregarding that requirement. Nor is the wisdom of the policy to concentrate compensatory education funds on a small number of pupils a matter for the Court's consideration." (footnote omitted.)

[42] *See, e.g.*, N.J. Pet. at 4a ("Congress enacted these [1978] amendments to correct the *injustice* which the earlier eligibility standards worked in areas with high concentrations of low-income families) (emphasis supplied); Ky. Pet. at 9a ("we are concerned with . . . the requirements of section 241e(a)(3)(B) and 45 C.F.R. 116.17(h), as those requirements were *ultimately* interpreted by the Secretary") (emphasis supplied); *supra* p. 21, text at note 40.

part of the Title I and Chapter 1 programs since their inception in 1965; the states were clearly notified of their applicability and scope long before the expenditures questioned in these audits and should not have had any difficulty in complying with them.

Eligibility. As we have noted, in order to promote the statutory goals, expenditures of grant funds must be targeted on discrete populations ("educationally deprived children"). While it would be highly desirable to assist all students in need of services, limited appropriations for the Title I program made this impossible. Hence, the statute provided that appropriations were to be allocated among States and school districts according to the number of children from low-income families,[43] and that funds were granted only for programs which would contribute to meeting the needs of educationally deprived children in areas within school districts where there are large concentrations of children from such families.[44]

The project area eligibility standards are linked to the additional requirement, which was maintained throughout all versions of the statute since Title I was first passed in 1965, that programs must be "of sufficient size, scope and quality to give reasonable promise of substantial progress toward meeting" those special

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[43] *See* 20 U.S.C. § 241c(2) (Supp. IV 1968); 20 U.S.C. § 2711(c) (1982); *see also* 20 U.S.C. § 3803 (1982) [Chapter 1].

[44] *See* 20 U.S.C. § 241e(a)(1)(A) (Supp. IV 1968); 20 U.S.C. § 2732 (1982); *see also* 20 U.S.C. § 3805(b)(1)(A) (1982) [Chapter 1]; *Alexander v. Califano*, 432 F. Supp. at 1189 (referring to "the legislative choice to concentrate rather than spread aid among educationally deprived children"). Once eligible project areas are selected, every child determined to be educationally deprived, regardless of economic status, is eligible to receive services. Educational deprivation is the sole criterion for deciding which children in a project area will participate in these federal programs.

needs.[45] The purpose of this provision is to avoid dissipation of federal grants by spreading them among too many underfunded projects in too many different schools. Because local school administrators are almost always under intense pressure to serve as many students as possible,[46] the threshold determination of eligible school attendance areas facilitates compliance with the "size, scope and quality" requirement. It is, for this reason, critical to the operation of successful compensatory programs.

The importance of the eligibility standard was consistently emphasized by the federal government and was well known to the Congress. For example, in 1966 the House Committee on Education and Labor reported amendments to the statute and commented:

> The committee notes that during the first year of operation funds have primarily been used in special projects in schools with the highest concentrations of children from low-income families. This is to be encouraged especially since funds are limited and therefore must be concentrated on the most pressing needs.[47]

Initial regulations which had allowed areas that did not meet the "highest concentrations of children from low-income families" requirement to be included in Title I

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[45] Pub. L. No. 89-10, § 205(a)(1)(B), 79 Stat. 27, 30, *reprinted in* 1965 U.S. Code Cong. & Ad. News 29, 33 (codified at 20 U.S.C. § 241e(a)(1)(B) (Supp. IV 1968)); *see* 20 U.S.C. § 3805(b)(3) (1982) [Chapter 1].

[46] *See* N.J.J.A. at 176 (New Jersey Department of Education's Application for Review of Final Audit Determination) ("LEA had no choice but to assume high concentrations of low-income families in all attendance areas and to attempt to spread the benefits of Title I as broadly as possible to assure that most educationally deprived children would be served").

[47] H.R. Rep. No. 1814, 89th Cong., 2d Sess. 3, *reprinted in* 1966 U.S. Code Cong. & Ad. News 3844, 3846.

programs[48] were quickly amended in 1967 to remove this option,[49] and the change was specifically brought to the attention of state education officials.[50] Thereafter, communications from the federal level repeatedly directed attention to the eligibility criteria and explained in considerable detail how comparisons of poverty concentrations should be made.[51]

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[48] 45 C.F.R. § 116.17(b) (1966) provided that attendance areas with numbers or percentages of children from low-income families which were at least as high as the district-wide average were eligible to be designated as project areas, and that "[o]ther areas with high concentrations of children from low-income families may be approved as project areas but only if the State agency determines that projects to meet the most pressing needs of educationally deprived children in areas of higher than average concentration have been approved and adequately funded."

[49] The language quoted in the preceding footnote was removed by 32 Fed. Reg. 2742, 2744 (February 9, 1967) and never reappeared. *See* 45 C.F.R. § 116.17(d) (1968).

[50] Title I Program Guide No. 28, *see Wheeler v. Barrera*, *supra* note 8, issued on February 27, 1967 to Chief State School Officers and State Title I Coordinators by U.S. Commissioner of Education Harold Howe, II, advised (p. 2) that:

> 1. The revised Title I regulations differ from the previous regulations in two important respects regarding project areas:
>
> a. It is no longer permissible to designate as project areas attendance areas with less than average concentrations of children from low-income families.
>
> . . . .
>
> 2. The purpose of the "attendance area" requirement in Title I is to identify the "target population" from which the children with special needs are to be selected.

[51] For example, Title I Program Guide No. 44, issued March 18, 1968 by Commissioner Howe to Chief State School Officers and state Title I coordinators, collected in one document the "Revised Criteria for the Approval of Title I, ESEA Applications from Local Educational Agencies." Section 1 of that document elaborated upon the Title I regulations with practical instructions about how

. . . .

Thus, far from creating a situation of injustice, the eligibility restrictions were designed to insure that the

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to collect data and make the necessary attendance area comparisons to determine eligibility.

On November 20, 1968, Commissioner Howe distributed Program Guide No. 48, entitled "Improving the Quality of Local Title I Compensatory Education Programs." In that directive, the Commissioner emphasized the need to make wise use of the limited funds available for effective compensatory programs:

> Many Title I programs are based on the selection of individual children from many grade levels from *all* of the *attendance areas* which are technically eligible to be included in the Title I program. This approach has usually resulted in programs which are not as effective as they might be. . . .
>
> The purpose of this memorandum is to suggest an approach to the planning of Title I programs which can result in improved program quality. This approach includes the following major steps:
>
> 1. Focus resources on a number of children in the "target population"—those in the most impoverished school attendance areas;

Id. at 1, 2 (emphasis in original). Finally, in the Title I Program Guide No. 45A, issued July 31, 1969 by Associate Commissioner Leon Lessinger, Chief State School Officers and Title I Coordinators were advised:

> Your title I, ESEA, offices are now in the process of reviewing and approving applications for grants from the fiscal 1970 appropriation (advance funding). A number of State educational agencies have already made special efforts to insure high quality programs that meet all legal requirements. Information reaching this office concerning the administration of Title I indicates, however, that in some cases further efforts are likely to be required if charges of noncompliance with Federal program requirements are to be avoided.
>
> . . . .
>
> In reviewing Title I proposals the SEA should be particularly alert to the following indications of violations of basic Title I requirements:
>
> . . . .
>
> 1. The applicant proposes to provide Title I services to children who do not reside in areas determined to be eligible for Title I, ESEA, services.

. . . . [Continued]

expenditure of Title I funds actually provided some benefits to the students who participated in the compensatory programs, rather than being just "a drop in the bucket"—and the importance of these criteria was repeatedly brought to the notice of state education officials.[52]

Supplanting. Although the Title I statute, in its original 1965 formulation, contained no explicit "anti-supplanting" language, it did limit the use of grant funds to projects designed to meet the "special educational needs of educationally deprived children,"[53] which the Congress understood to incorporate the notion that Title I expenditures should supplement local programs.[54] Accordingly, from the outset the Title I regulations included a prohibition against supplanting.[55] By 1968, six years before the Kentucky expenditures at

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[51] [Continued]

> Each SEA should adopt a plan and schedule visits for monitoring local Title I programs. In checking on local program operations the SEA should take appropriate action if there is any evidence indicating violations, such as the following:
>
> 1. Use of Title I funds in areas not designated as eligible Title I areas.

[52] It is not without significance, in this connection, that the Newark, New Jersey school system apparently had little difficulty in correctly identifying eligible schools in the school year following those for which the auditors noted misexpenditures. *See* N.J.J.A. at 26 (Final Audit Report).

[53] Pub. L. No. 89-10, § 2 [adding § 205(a)(1)(A)], 79 Stat. 27, 30, *reprinted in* 1965 U.S. Code Cong. & Ad. News 29, 33 (codified at 20 U.S.C. § 241e(a)(1)(A) (Supp. IV 1968)).

[54] *See, e.g.*, 111 Cong. Rec. 7353 (daily ed., April 9, 1965) (Sen. Morse, floor manager) ("I wish to clarify [the permitted use of Title I funds] as a matter of legislative history. . . . The funds in Title I must be used to help the educational needs of educationally deprived children, not to remove any State responsibility from any State in providing education for its children").

[55] *See* 45 C.F.R. § 116.17(f) (1966).

issue here, the regulatory language referred unmistakably to providing a fair share of state and local resources to *participating children*, as well as *project areas*.[56] As in the case of eligibility criteria, federal authorities explained the implications of the non-supplanting requirement with great specificity and clarity.[57]

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[56] *See* 45 C.F.R. § 116.17(h) (1968):

> Each application for a grant under Title I of the Act for educationally deprived children residing in a project area shall contain an assurance that the use of the grant funds *will not result in a decrease in the use for educationally deprived children residing in that project area* of State or local funds which, in the absence of funds under Title I of the Act, would be made available for the project area and that *neither the project area nor the educationally deprived children residing therein will otherwise be penalized* in the application of State and local funds because of such a use of funds under Title I of the Act.

(emphasis supplied.) *See also* Program Guide No. 44, *supra* note 51, § 7.1 ("It is expected that services provided within the district with State and local funds will be made available to all attendance areas *and to all children* without discrimination") (emphasis supplied).

[57] Title I Program Guide No. 48, issued November 20, 1968 by Commissioner Howe, explicitly covered the sort of situation which developed in the 50 Kentucky school districts in 1974 and indicated that a contribution of state or local funds would be required to avoid supplanting:

> 3. Design a comprehensive program that will meet the most pressing needs of each child in the priority groups, utilizing all available local, State and Federal resources;
>
> . . . .
>
> As indicated in item 3 above, the entire school program in the project for the disadvantaged children involved. *State and local funds would then be used to pay for that portion of the program which would replace the pre-existing regular school program and Title I funds would be used to pay for additional services above that level.*

Id. at 2 (emphasis supplied). Separate Program Guides and memoranda were issued by the Commissioner explaining the comparability requirement, *see supra* note 39 & accompanying text.

Nevertheless, the occurrence of supplanting was widespread in the early years of the Title I program, a fact that was brought to the attention of the Congress by both the U.S. Office of Education and outside groups.[58] As a result, in 1970 specific language prohibiting supplanting was added to the statute itself. That language referred to the continuation of state and local spending "for the education of pupils participating in programs and projects assisted under this title."[59] While we think that that language, standing alone, is sufficiently definite and precise to have put Kentucky on notice of the impropriety of the "readiness class" expenditures, *see supra* p. 20, there simply could be no misunderstanding of its significance in light of the substantial attention given to the concept throughout the history of the Title I program. For the same reason, it is obvious that the Secretary's interpretation of the statutory and regulatory non-supplanting language which was applied to the Kentucky audit was no *post hoc* reading, as the Court of Appeals seemed to suggest.[60]

In both these cases, then, not only is the Secretary's interpretation of the statute and regulations amply supported by the language and legislative history, but the states received repeated and specific notice of that interpretation long before the events that produced the audit exceptions.

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[58] *See* S. Rep. No. 634, 91st Cong., 2d Sess. 9, *reprinted in* 1970 U.S. Code Cong. & Ad. News 2768, 2776, referring to Washington Research Project, et al., *Title I of ESEA: Is It Helping Poor Children?* (1969).

[59] Pub. L. No. 91-230, § 109(a), 84 Stat. 121, 124, *reprinted in* 1970 U.S. Code Cong. & Ad. News 133, 137 (codified at 20 U.S.C. § 241e(a)(8) (1970)). *See also supra*, text at note 39.

[60] *See supra* note 42.

CONCLUSION

For the foregoing reasons, *amicus* respectfully suggests that the judgments of the Court of Appeals for the Third and Sixth Circuits in these matters should be reversed.

Respectfully submitted,

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